



August 6, 2001

Ms. Michelle Simpkins
Winstead
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2001-3409

Dear Ms. Simpkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150321.

The Brushy Creek Municipal Utility District (the "district"), which you represent, received a written request for "all E-Mail received by or sent by all Members of the Board of Directors, Legal Counsels, all consultants, and the General Manager since 5 April 2001." You indicate that the district has released a portion of the responsive information to the requestor. You have submitted to this office as responsive to the request a representative sample of e-mail communications maintained by the district's consultants (the "engineer correspondence") and e-mail communications between the district's general manager and legal counsel (the "district correspondence").¹ You contend that the engineer correspondence is excepted from public disclosure pursuant to section 552.111 of the Government Code² and that the district correspondence is excepted from public disclosure pursuant to

¹You have also submitted a memorandum dated May 4, 2001 from the consultants to the district. Because this document does not appear to be responsive to the request for "e-mail," we do not view this memorandum as being responsive to the request and therefore do not address whether this document is subject to public disclosure.

²We note that although you also sought to withhold this information pursuant to section 552.107(1) of the Government Code in subsequent correspondence to this office, you did not raise this exception with regard to the engineer correspondence within ten business days of the district's receipt of the records request. We therefore deem section 552.107(1) as waived with regard to the engineer correspondence. *See* Gov't Code §§ 552.301(b), .302.

sections 552.107(1) and 552.111 of the Government Code.³ The requestor has also submitted comments to this office regarding your request. *See* Gov't Code § 552.304.

Section 552.107(1) of the Government Code provides in relevant part that information is excepted from required public disclosure if:

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Based on our review of the district correspondence you submitted as Exhibit C, we conclude that this information reveals client confidences or legal advice or opinion and is therefore excepted from disclosure under section 552.107(1) of the Government Code in its entirety.

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993) at 5. The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). *See also City of Garland v. Dallas Morning News*, 43 Tex. Sup. Ct. J. 303 (Jan.13, 2000). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

³In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). Accordingly, we will consider the application of section 552.111 to the e-mails between the district and its consultants.

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the engineer correspondence that the district may withhold pursuant to section 552.111. The district must release the remaining information contained in the engineer correspondence, with the following possible exception.

We note that the engineer correspondence contains a district employee's cellular telephone number. Section 552.117(1) excepts from disclosure information that relates to, among other things, the home telephone number of current or former employees of a governmental body who request that this information remain confidential under section 552.024 of the Government Code. It is not clear to this office, however, whether the cellular telephone is owned and paid for by the district or by the employee. If the telephone is owned and paid for by the employee, the telephone number must be withheld pursuant to section 552.117(1) of the Government Code, but only if the employee had elected to prohibit the release of his section 552.117(1) information prior to the district's receipt of the current records request. *See* Open Records Decision No. 530 at 5 (1989) (whether particular information is protected by section 552.117(1) must be determined at time request for it is made). Otherwise, the district must release the cellular telephone number.

In summary, the district may withhold the "district correspondence" you submitted to this office as Exhibit C in its entirety pursuant to section 552.107(1) of the Government Code. The district may also withhold the information we have marked in the "engineer correspondence" you submitted as Exhibit B pursuant to section 552.111 of the Government Code. The cellular telephone number contained in Exhibit B must be withheld only if the telephone is owned and paid for by a district employee and that employee had elected to make the telephone number confidential under section 552.024 prior to the district's receipt of the current records request.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen A. Eckerle".

Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/RWP/seg

Ref: ID# 150321

Enc. Submitted documents

c: Mr. John C. McLemore
8400 Cornerwood Drive
Austin, Texas 78717
(w/o enclosures)